108-2 88

FILED
FEB 26 1881

SUPREME COURT OF THE UNITED STATES.

No. 795.

JOHN S. FARLOW,

Receiver of the Cincinnati, Sandusky and Cleveland Railroad Co., Appellant,

AGAINST

SYLVANUS KELLY.

MOTION TO DISMISS APPEAL.

BRIEF FOR APPELLANT.

S. A. BOWMAN FOR APPELLANT.

APPELLANT'S BRIEF.

The appellee seems to rely in support of his motion to dismiss the appeal in this cause upon the following grounds:

1 That the appellant as receiver was an officer of the Circuit Court, and not a party to the suit, and therefore could not appeal from the decree made against him as Receiver.

He was authorized by the order appointing him [R., page 12,] to institute and defend all suits and proceedings necessary to the proper discharge of his duties, and to prosecute all such suits as he might be advised it was necessary and proper for him to do ~~further~~ further without application to the Court. He is something more than an officer of the Court. He is the representative of all the parties to the suit, whose interests in the subject matter for the time being are entrusted to his care

High on Receivers, section 175.
Davis v. Gray, 16 Wal., 217.

In High on Receivers, Sec. 207, it is said touching this subject: "It is important in this connection to observe that the general doctrine of Courts of Equity recognizing a Receiver as the officer or representative of the Court from which he derives his appointment is not to be understood as limiting or restricting his right in the management of a suit which he has once undertaken. And after entering upon the litigation he is regarded as being entitled to all the freedom of action of any other person, and the fact that he appeals from a decision which is adverse to him is not of itself evidence of bad faith or mismanagement of his trust, and may be a meritorious rather than a censurable act."

The decree is against him for the money. The money is to be paid by him. It is true that it is not his money. It is also true that the money does not belong to the Court which appointed him.

On application of the parties to the suit who own the fund which is in his hands, I admit the Court might make an order directing him not to appeal; it also might, upon the same application, make an order directing him to appeal. The parties in interest, however, have not intervened; they, therefore, must be held to approve the action of the receiver. The Court has made no order touching this appeal. Neither the complainants nor the defendant in the suit, both of whom are the parties in interest in the fund in the hands of the receiver, can appeal, because no decree has been rendered against them or either of them.

There is no force in the argument that his possession of the fund is the possession of the Court that appoints him, and that he is guilty of contempt in applying, by appeal, to a court of appellate jurisdiction, to review the order which has been made against him.

Hinkley *vs.* Railroad Co., 10 Otto, 153.

The vice of the argument is found in the fact that over the Court which appointed the receiver this Court has supervisory power.

2. "That the order appealed from is not a final judgment in a civil action or a final decree in a case in equity."

It is well settled that the words "final decree," in the statute allowing an appeal, are not to be taken in their strict and technical sense.

"When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this Court."

Forgay *vs.* Conrad, 6 Howard, 204.

See also

Hale *vs* Frost, 9 Otto, 380.

French *vs.* Shoemaker, 12 Wal. 86.

S. A. BOWMAN,
Sol'r for Appellant.

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FEB 26 1901

SUPREME COURT OF THE UNITED STATES.

No. 795.

JOHN S. FARLOW,

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AGAINST

SYLVANUS KELLY.

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Forgay *vs.* Conrad, 6 Howard, 204.

See also

Hale *vs* Frost, 9 Otto, 380.

French *vs.* Shoemaker, 12 Wal. 86.

S. A. BOWMAN,
Sol'r for Appellant.

108-288

IN THE

Supreme Court of the United States.

JOHN S. FARLOW, RECEIVER OF C. S. & C. R. R. CO.,
APPELLANT,

No. 795. *vs.*

SYLVANUS KELLY,
APPELLEE.

Appeal from Circuit Court of the United States, for the Northern District of Ohio.

MOTION TO DISMISS APPEAL.

BRIEF FOR APPELLEE.

R. P. BUCKLAND,
J. WARREN KEIFER,
FOR APPELLEE.

JOURNAL PRINT, FREMONT, O.

IN THE

Supreme Court of United States.

JOHN S. FARLOW, RECEIVER OF C. S. & C. R. R. CO.
APPELLANT,

No. 795. *vs.*

SYLVANUS KELLY,
APPELLEE.

Appeal from Circuit Court of the United States, for the Northern District of Ohio.

MOTION TO DISMISS APPEAL.

APPELLEE'S BRIEF.

This is an appeal by a Receiver from an order of the Court appointing him, confirming Master's Report finding him liable as Receiver to Appellee for negligence in running a train on the C. S. & C. R. R., on which Appellee was a passenger, and for the application of monies in his hands as Receiver in payment of $5,001 damages for the injury.

The Master found the damages to be $9,000, which the Court found excessive, and reduced the amount to $5,001, and confirmed the Master's report in all other respects.

On application of complainants in original suit the Court below refused to allow an appeal. The Receiver made no application to the Court below for the allowance of an appeal, but applied to Hon. Noah H. Swayne, Justice of Supreme Court, who allowed an appeal.

The complainants in the original cause have not appealed.

For the purposes of this motion the facts sufficiently appear from the order of the Circuit Court appealed from and the application of the Receiver to Mr. Justice Swayne, copies of which are here given:

ORDER OF CIRCUIT COURT APPEALED FROM.

TUESDAY, Sept. 30th, (1879.)

John C. Pratt, et al,
vs.
The Cincinnati, Sandusky and Cleveland R. R. Co., et al. } Chancery.

And now come the said parties by their attorneys, and thereupon the motion of the said John S. Farlow, Receiver in this action, to set aside the report of Homer Everett, Master Commissioner of this Court, heretofore made in this action upon the issues between Sylvanus Kelly, complainant, and the said John S. Farlow, Receiver in the above entitled cause heretofore awarded by the Court here, came on to be heard and was argued by counsel. On consideration whereof the Court do find that the sum of nine thousand dollars ($9.000) which said Master, in the 19th paragraph of his said report, finds as the amount that the said Sylvanus Kelly should receive from said John S. Farlow, Receiver, as his compensation for the injuries complained of, is excessive, and do therefor sustain the said motion of the said Farlow, Receiver, as to the matter and things set forth and contained in the said 19th paragraph of said Master's report as therein numbered and stated, and order that so much of said Master's report as is contained in the 19th paragraph thereof be and the same is hereby vacated and set aside. The Court do overrule the motion of the said John S. Farlow, Receiver, as to all other matters and things set forth and contained in the Master's said report, and order that the said report and the several things and matters therein contained, and not by this decree vacated and set aside as aforesaid, do stand ratified and confirmed. The Court thereupon find the sum of five thousand and one dollars ($5,001) to be a full, fair and just compensation to the said Sylvanus Kelly for his injuries by him complained of herein, and that he is entitled to receive the said sum from the said John S Farlow, Receiver.

It is further ordered that the said John S. Farlow, Receiver, pay to the said Sylvanus Kelly the said sum of five thousand

and one dollars ($5,001), together with interest thereon from the 25th day of September, 1879. until paid, and the costs and Master's fees aforesaid out of any monies which are in or may come to the hands, control or possession of him, the said John S. Farlow, as such Receiver, said Master's fees being hereby fixed at two hundred dollars ($200.)

Thereupon come the complainants, John C. Pratt and W. T. Hart, by their solicitors, and give notice of their intention to appeal this cause to the next term of the Supreme Court of the United States, and this Court refuses to allow such appeal. To which refusal of the Court the said complainants by their solicitors except.

APPLICATION FOR ALLOWANCE OF APPEAL.

To the Honorable Noah H. Swayne, Justice of the Supreme Court of the United States:

John C. Pratt and William T. Hart
against
The Cincinnati, Sandusky and Cleveland Railroad Co.

The appeal of John S. Farlow, Receiver of the Cincinnati, Sandusky and Cleveland Railroad Co., duly appointed in the above cause, the Appellant respectfully showeth

That upon the first day of May, 1877, the above named complainants filed their bill in the Circuit Court of the United States for the Northern District of Ohio, against the Cincinnati, Sandusky and Cleveland Railroad Co., praying among other things for a decree of sale of the said railroad, and for the appointment of a Receiver to run and operate the same pending said suit.

That such proceedings were had in said cause that upon the 15th day of May, 1877, the Appellant, John S. Farlow was appointed Receiver of said Railroad, with authority to run and operate the same with the usual power granted Receivers in such cases, and entered upon his duties as such Receiver.

That upon the 16th day of September, one Sylvanus Kelly filed in said cause a petition against the Appellant setting forth that he had been injured while riding as a passenger upon one of the trains of said Railroad, so run and operated by said Receiver, and that he had sustained damages by reason of said injuries in the sum of nine thousand dollars, and praying an order that said Receiver should be decreed to pay him said sum as compensation for said injuries.

The said Receiver and these complainants answered denying the right of said Sylvanus Kelly to receive compensation for said injuries. The issue made by said Petition and Answer was by said Circuit Court, on the 9th day of January, 1879, referred to Hon. Homer Everett, as Special Master to take testimony and report upon the claims of said Sylvanus Kelly, and on the 28th day of April, 1879, said Special Master filed his report with the testimony taken before him in said cause, in favor of said Sylvanus Kelly, and awarding him $9,000 as compensation for said injuries.

That on the 26th day of May, 1879, the complainants and this Appellant each filed exceptions to said report, which were overruled by said Court except to the amount of said finding.

That on the 30th day of September, 1879, at the April term of said Circuit Court, a final decree was made and pronounced in said cause, wherein it was in substance adjudged and decreed that said report be confirmed except as to the amount found in favor of said Sylvanus Kelly, and that said Sylvanus Kelly be awarded as compensation for said injuries the sum of $5,001, and that the said Receiver pay to the said Sylvanus Kelly said sum of $5.001, with interest from the 25th day of September, 1879, and the costs of said suit out of any monies which are or may come into the hands, control or possession of the Appellant.

Whereupon the appellant appeals from the whole of said decree of said Circuit Court of the United States and respectfully prays that that the decree of the said Circuit Court and the petition, answer, pleadings, depositions, evidence and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the Circuit Court and every part thereof may be reversed and a decree made dismissing said petition with costs and such other decree as to the said Supreme Court shall seem just.

S. A. BOWMAN,
Complainant's Solicitor.

Appeal allowed January 23d, 1880.

N. H. SWAYNE,
Ass't Justice Supreme Court.

Filed January 31st, 1880.

The complaint of Sylvanus Kelly was filed by leave of said Circuit Court.

MOTION TO DISMISS APPEAL.

To the Honorable the Supreme Court of the United States:

Sylvanus Kelly, Appellee in the above entitled cause, now comes and moves this Honorable Court to dismiss the Appeal of said cause to this Court for the following reasons:

1st. Thst said appeal was not allowed by said Circuit Court.

2d. That on motion for said appeal to the said Circuit Court the motion was overruled by said Circuit Court, and said Circuit Court refused to allow said cause to be appealed to this Court.

3d. That said appeal was taken by said John S. Farlow, as such Receiver, without any proper allowance or order therefor either by said Circuit Court or by this Court or any Judge thereof.

4th. That the Supreme Court of the United States has not jurisdiction to order the allowance of appeal in said cause or to entertain said cause upon appeal from the said order of said Circuit Court ordering said John S. Farlow, as such Receiver, to pay out of monies in his possession as such Receiver to said Sylvanus Kelly, the said sum of $5,001.

5th. That said John S. Farlow, as such Receiver, was subject to the order of said Circuit Court, and all property and money in his possession as such Receiver were subject to the order of said Circuit Court, and the said order made by said Circuit Court in said cause was not subject to be appealed from to this Court by said John S. Farlow as such Receiver, or by the complainants in said original cause.

6th. That said cause was irregularly brought into this Court by appeal and without authority of law.

Wherefor said Appellee prays that said appeal may be dismissed with costs and said cause remanded back to said Circuit Court for the execution of the said order.

R. P. BUCKLAND,
J. WARREN KEIFER,
Solicitors for Appellee.

ARGUMENT.

1st. The Appellant in this case is a Receiver, appointed by the Court below in the foreclosure suit of Pratt & Hart vs. The C. S. & C. R. R. Co., et al. He is an officer of that Court and not a party to the suit. As such Receiver, by order of the Court, he is in the possession and management of the C S. & C. R. R., its earnings, &c., and his possession is the possession of the Court, and he can do nothing in regard to the same except as he is authorized by the Court appointing him. His application to Mr. Justice Swayne for the allowance of appeal is without the authority and in contempt of the Court appointing him. Therefore the allowance of the appeal by Mr. Justice Swayne was improperly made and does not give the Supreme Court jurisdiction of the cause attempted to be appealed.

Story's Equity, Secs. 831-833. *High on Receivers, Secs.* 177-178.

"In the next place, a receiver, when in possession, has very little discretion allowed him, but he must apply from time to time to the Court for authority to do such acts as may be beneficial to the estate. Thus he is not at liberty to bring or to defend actions; or to let the estate; or to lay out money; unless by special leave of the Court."—*Story's Equity, Sec.* 833.

"When a receiver has been appointed, his possession is that of the Court, and any attempt to disturb it without leave of the Court first obtained, will be a contempt on the part of the person making it."—*Wiswall vs. Sampson*, 14 *Wall.* 65.

In the case of *Kennaly vs. Indianapolis, etc., R. R. Co.*, U. S. Circuit Court Southern District of Ohio, July, 1880. *The Central Law Journal, Vol.* 11, *No.* 5, *p.* 89. Judge Baxter says: "The Court will not permit any person to interfere either with money or property in the hands of its receiver. without leave, whether it is done by consent or submission of the receiver or by compulsory process against him. All monies coming into the hands of a receiver by the order of the Court, are monies belonging to the Court, and the receiver is bound to distribute in obedience to the orders and directions of the Court. *Kerr on Receivers*, 168. The re-

ceiver's possession being the possession of the Court from which he derives his appointment he is not subject to the process of garnishment as to the funds in his hands, or subject to his control, and such process will be regarded as a nullity. The Court being in the actual custody of the property or fund will not yield its jurisdiction to another Court and permit the right of property to be there tried. It will not permit itself to become a suitor in another forum concerning the property in question."—*High on Receivers, Sec.* 151.

"The power of Courts over their own receivers, including their authority to control them in the settlement of all demands against the property held by them in their capacity as receivers, is well established, and as officers of the Court it is their duty to obey all orders of the Court in this regard."—*High on Receivers, Sec.* 177.

2d. The order appealed from is not a final judgment in a civil action, or a final decree in a case of equity. It is an interlocutory order in an equity case still pending in the Court below, directing an officer of the Court to apply funds in its own possession and under its own supervision. Such an order being within the discretion of the Court is not subject to appeal, either by the Receiver, who can only act by authority of the Court, or by the parties to the equity case.

Hentig vs. Page, in Supreme Court of the United States, Oct. Term, 1880.

Sheets vs. Selden, 7 *Wall* 416.

The allowance of the appeal by Mr. Justice Swayne does not make the appeal by the Receiver valid.

Callan vs. May, 2 *Black* 542.

R. P. BUCKLAND,
J. WARREN KEIFER,
Solicitors for Appellee.

OFFICE SUPREME COURT U.S.
FILED
MAR 28 1903
JAMES H. McKENNEY, Clerk.

108-288

SUPREME COURT OF THE UNITED STATES.

No. 226

JOHN S. FARLOW, RECEIVER OF
C. S. & C. R. R. Co., Appellant.

vs.

SYLVANUS KELLY.

BRIEF FOR APPELLANT.

S. A. BOWMAN for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 226.

JOHN S. FARLOW, RECEIVER OF

C. S. & C. R. R. Co., Appellant.

vs.

SYLVANUS KELLY.

BRIEF FOR APPELLANT.

S. A. BOWMAN for Appellant.

FARLOW, RECEIVER &C.,
vs.
SYLVANUS KELLY.

APPELLANT'S BRIEF.

STATEMENT.

In May 1877 the mortgagees of the Cincinnati, Sandusky & Cleveland Railroad Company filed their bill to sell said Railroad in the Circuit Court of the United States for the Northern district of Ohio; and on the 18th of May 1877 the appellant, in pursuance of the prayer of said bill, was appointed receiver of said Railroad Company with the usual powers, and prior to the 23d day of August 1877 had obtained possession of said Railroad, and was at the time of the accident, of which the appellee complains, engaged in operating the same in pursuance of said order of appointment.

On the 13th day of November 1878, the said Court, on application of the appellee, ordered that he have leave to file in said foreclosure suit a petition against the appellant for damages claimed to have been sustained by him while a passenger on said Railroad.

On the same day the appellee filed his petition in said foreclosure suit against said receiver, alleging that on the 23d day of August 1877 the said receiver, by his agents and servants, negligently placed a freight car so near the main track of said Railroad that in consequence thereof, and of the negligence of the receiver's agents, having charge of the train, in not observing said freight car, and in running said train at two great speed, the coach in which the appellee was riding, as a passenger ran against said freight car, whereby said appellee's right arm, without any fault on his part, was knocked out of the window of the coach in which he was riding, and broken by collision with said freight car.

The Receiver, having been ordered by the Court to answer this complaint, filed an answer denying all the charges of negligence, and averring that the appellee was injured through his own negligence by improperly placing his arm in an open window of said coach, whereby it came in contact with said freight car. To which answer the appellee filed a replication in the ordinary form in equity.

At the October term 1878 of said Court, (R. 21) on application of the appellee, the Court referred the issue between the parties to a special master to take testimony and to determine and report whether the receiver was liable for the injuries complained of by the appellee, and the amount of compensation he should receive for the same, with directions to report his findings with the evidence, &c.

On the 28th day of April 1879 (R. 97) the master filed his report, finding that the appellee should receive nine thousand dollars for the injuries of which he complained.

On the 26th day of May (R. 101) the complainants in the foreclosure suit and the appellant filed eleven exceptions to the report of said master, which upon being heard by the Court (R. 103) were all overruled, except the eleventh, which was sustained by the Court on the ground that the compensation assessed by the Master was excessive, which amount the Court reduced to $5,001. and thereupon ordered the said Receiver to pay to the said appellee $5,001. and the costs; from which order the appellant prosecutes this appeal.

ARGUMENT.

I.

The appellant in his second (R. 101,) and seventh (R. 102) exceptions complains of the report of the master for that he finds in the seventh (R. 99,) and sixteenth (R. 100,) paragraphs of his report that the appellee shortly before the accident, having a severe headache, placed his right elbow on the sill or *base of the open window* of the coach, and rested his head on his right hand, and that his elbow did not project beyond the outside of the coach until it was thrown outside by the jar of the coach when struck, and was not voluntarily placed in such position.

The train was composed (Grant 5th, Q. R. 82,) of a baggage car, parlor car, smoking car and coach No. 9, arranged in the order they are named; the appellee riding in the rear coach, No. 9. The witnesses differ as to the extent to which the coach was affected as it passed the standing freight car: some of them stating that the jar was considerable; but the most of them, that it was barely noticeable.

All those, however, who examined the car agree that it received no more than a paint scratch. It is undisputed that it was continued in use without any repair whatever. The speed of the train was not preceptably checked, and no one received the slightest injury, save the appellee.

A digram of the seat and window will be found R. 49. The appellee himself, though urged by his counsel, refused to testify that his elbow was thrown outside by the jar of the contact with the freight car. His testimony on this subject (R. 32,) is as follows:

2nd QUESTION. State the circumstances under which you received the injury resulting in the loss of your arm, on the 23rd day of August, 1877.

ANSWER. I got aboard of the C., S. & C. train about eleven o'clock, forenoon, at Sptingfield, Ohio. I was bound for Clyde on that road. In coming into the town of Bellefountaine I met with a crash. I was in the rear coach of the train. I was sitting on the right hand side of the coach. I was faced to the front of the train. I was a little forward of, and near the centre of the coach. The coach window at my right hand was open. I sat with the elbow of my right arm on the window sill, or base of the window. I was leaning forward resting my forehead on my right hand. While in that position the sensation was that the car was struck a fearful blow sideways, and my arm was injured at that same instant.

3rd Q. In what manner, and how was your arm injured?

A. My elbow was crushed, and I was thrown over to near the center of the car.

4th Q. What effect did the blow have, if any, as to displacing the position of your elbow on the window sill?

A. I think the effect of it would be that it jarred off the window sill.

5th Q. In what direction, in or out?

A. Jarred it out would be the effect.

6th Q. In what particular position, with reference to being inside or outside the coach, was your elbow at the instant your arm received the injury?

A. Well, I think it was in the window at the time it received the injury.

7th Q. How in the window? I mean at the instant you received the injury.

A. I don't know that I can tell to the fraction of an inch just where it was at the time it was struck.

8th Q. State about where it was. I mean at the very instant it received the injury.

A. Well, my elbow was resting on the window sill. The blow of the car might have caused it to slip over perhaps in the position it was standing at the time.

A. C. Gennings (R. 23,) who sat in front of him on the opposite side, noticed him before the accident, "sitting in a leaning or reclining position, his head resting on his hand, his elbow resting on the window sill of the coach;" and Mrs. Gennings (R. 25, Q. 5.) "His head was resting on his hand, his elbow either on the window sill or arm of sofa." The only other witness, in behalf of the appellant, who speaks of his position is Emily Henderson, whose testimony will be found R. 40–41. She stood in her door-yard, near the standing car, some twenty or thirty feet from

the train. Her statement is (X. Q. 2, R. 41.) "Did you see him in the cars on that day before the accident occurred. Ans. Yes sir. I saw him leaning on his arm. His arm was not out of the car; just about on the middle of the window.

For the appellant, Dr. Dunlap, one of the attending surgeons, states (R. 86, Q. 6, 9,) that on the occasion of his second visit, the appellee told him his arm was lying in the window, and Mrs. Allen (R. 87--8,) who sat right in the rear of him watching her boy, who sat in front of him, swears positively that he sat with his head resting on his hand, with his arm in the window, and his elbow projecting out of the car, apparently asleep.

If the Court will examine the testimony of Mr. Woodbridge (R. 52, Q. 29--37,) in connection with a plat of a section of one of the windows and a seat of coach No. 9, (R. 48,) it will be seen that if the appellee had his elbow on the sill of the window there was a solid board projecting five inches above the sill which would have prevented it being jarred out, and Mrs. Henderson from seeing it; and that if the appellee means by the sill or base of the window the top of that board, on which his arm must have rested in order to enable it to have been struck, inasmuch as this board was only seven-eighth of an inch thick, his own testimony renders it almost certain that his elbow projected outside the window through his own voluntary act; and that his statement to Dr.

Dunlap (R. 86, Q. 8 and 9,) that his arm was *lying in the window* at the time it was hurt, was the truth.

By the sill or base of the open window the appellee must mean, as the master evidently finds it to be, the top of the board five inches in heighth and seven-eighth of an inch in width, which, when the window is open, forms the base of the opening.

II.

The ninth exception of the appellant is directed against the proposition of law stated in the 17th paragraph of the Master's report, which, with the 16th, is as follows:

"16th. The testimony is somewhat conflicting as to whether his elbow projected beyond the outside of the car before the shock of the collision. After weighing the evidence on the point, I find his elbow did not so project until it was thrown outside by the jar of the car when struck, and that it was thrown by the jar of the collision, and was not voluntarily placed in such position.

17th. Whether resting his elbow on the sill or base of the window by Kelly was an act of negligence in itself is a question of some difficulty. The authorities are numerous on both sides. The question has been differently decided in different State Courts. Ohio does not afford an adjudication of it. After reviewing the confusion and conflict of these decisions of State Courts on the question, I have, as authority,

adopted the views expressed in the case of Curtis vs. the Central Railway, reported in McLan's Circuit Court Reports, vol. 6, p. 401, and those State Courts, which follow that decision, and find that such position in the cars was not of itself negligence on the part of Kelly."

In Todd vs. O. C. & F. R. R. Co., 3 Allen 208, the Court say, in a similar case, "His own testimony shows that it was resting on the sill of the window of the car, and that a portion of it, when the injury was inflicted, was beyond the sash, so as to be outside of the external surface of the window. Nor was there any doubt or dispute that if the plaintiff had kept himself entirely within the limits of that part of the car intended for, and appropriated to passengers, the accident which occasioned the injury would not have happened. It was the plaintiff's own act which contributed to the injury."

This case is followed and sustained by the following authorities:

P. & C. R. R. Co. vs. McClurg, 56, Pa. St. 294.
L. & N. R. R. Co. vs. Sickings, 5, Bush. 1.
P. & C. R. R. Co. vs. Andrews, 39, Md. 329.
I. & C. R. R. Co. vs. Rutherford, 21, Ind. 83.

The case upon which the Master based his decision are clearly against the weight of authority, and against the rule, well established in Ohio, on the doctrine of contributory negligence.

Geiselman vs. Scott, 25, O. S., 88, holds that the

party injured cannot recover if he has contributed in any degree to the injury.

The passenger coaches of R. R. Companies are built with great strength, so that in case of any ordinary accident to the car, the passenger who makes proper use of the provisions for his safety, and keeps his person within the coach, will be secure. The windows are provided with light and air, for all the passengers, and not for the use alone of those who sit next to them, and clearly not for the purpose of being occupied as rests or supports for any part of the body of a passenger. The plat shows that (R. 48) a rest for the arm of the appllee was provided where it would have been secure from injury against this accident. Passengers, as well as R. R. Companies, know that R. R. trains are liable to accidents; that the business is complicated; and a sound public policy, I submit, requires that passengers be held responsible for any unnecessary exposure of their persons to danger.

How it happened that the empty freight car became moved, shortly before the accident, from the place where it stood down to the south end of the switch, so as to cause this accident, could not be ascertained. The Master's finding on this subject is not sustained, we think, by the evidence; nor is his finding that the engineer of the train to which the accident happened was guilty of negligence.

The only testimony on that subject is that of the engineer himself (Robert Nayler, R. 70), which

shows that he was careful, discovered the probable danger from the car as soon as he could have been been expected to, and did what he could to prevent the accident; and stopped the train within fifty to one hundred feet of the empty freight car, which struck the arm of the appellee. (R. 72, Q. 39.

But our proposition is that, even if there was negligence in the appellant's agents in allowing the empty freight car to get to the south end of the switch too near to the main track, still the appellee would not have been injured but for his own want of care in placing his arm in the open window. It was this act of his which caused the injury; for it is undisputed that if he had kept his arm out of the open window he would not have received any injury.

S. A. BOWMAN,
COUNSEL FOR THE APPELLANT.

108-288

SUPREME COURT U.S.
FILED
MAR 31 1893
J. HOWARD MCKENNEY, CLERK

Supreme Court of the United States.

No. 226.

JOHN S. FARLOW, Receiver of C. S. & C. Railroad Company, Appellant,

vs.

SYLVANUS KELLY, Appellee.

BRIEF FOR APPELLEE.

R. P. BUCKLAND,
For Appellee.

THOMAS MCGILL & CO., PRINTERS, WASHINGTON, D. C.

FARLOW, RECEIVER, &c.,
vs.
SYLVANUS KELLY.

APPELLEE'S BRIEF.

A motion was made by the appellee to dismiss the appeal in this case on the ground that the receiver was an officer or agent of the court below, and subject to its orders. John C. Pratt and William T. Hart, complainants in the foreclosure suit, gave notice of their intention to appeal from the order of court ordering the receiver to pay Sylvanus Kelly $5,001, and the court refused to allow such appeal, (R. 104.) John S. Farlow, as receiver, applies to Hon. Justice Swayne for leave to appeal from said order, which is allowed. Pratt and Hart have not appealed. The receiver did not apply to the court below for leave to appeal, or give notice of his intention to appeal, (R. 102, 105.) The motion to dismiss the appeal was overruled. I simply desire to raise the question whether the appeal was properly taken.

II.

There is no dispute as to the time, manner, or extent of the injury. It was necessary to amputate appellee's right arm near the shoulder to save his life.

It is very conclusively established by the testimony that the collision which inflicted the injury was caused by the gross negligence of appellant's agents. A short time before the train on which appellee was injured came into Bellefontaine from the south, a freight car on the side track was moved too near the south switch and so near the main

track that it was struck by the cars of the incoming train, known as No. 6. Undoubtedly this freight car was moved to that position by train No. 5, which came in from the north a few moments before No. 6 and ran on to the side track, shoving two other freight cars out of its way and against the one struck. Appellant's witness, David Boyd, station agent, testifies (R. 56) as follows on cross-examination:

"Q. 34. How many cars, including locomotive, was there in the train on the side track, going south?

A. There was five including locomotive.

Q. 36. Is it not true that there was a box-car standing on or near the north end of that same side track at that time?

A. My recollection is that there were two near that end.

Q. 37. Is it not true when passenger train No. 5 went on to the side track it pushed these two cars along on the side track to give room for it?

A. By my own knowledge I cannot say that it did; but from the location of the cars in the morning it would have to do so to get in."

The grade of this side track was down from north to south, and several witnesses testify that cars would run down too near the main track, and have to be moved back. This required extra vigilance by the persons in charge. Yet nothing was done to insure safety until after this collision. Some time after a lock-block was placed on the lower part of the side track to prevent cars running down too near the main track. (R., p. 58; same witness; questions from 60 to 70.)

III.

The proof being clear that the injury was caused by collision of a passenger coach with a freight car standing on appellant's side track, too close to the main track, the burden of proof is on appellant to show that the collision

could not have been prevented by proper care and diligence on the part of appellant or his agents; also that appellee was guilty of contributory negligence. The highest degree of care and diligence is required.

3 Otto, 296, and authorities the cited.
Stokes *v.* Saltonstal, 13 Peters, 181.
Railroad Co. *v.* Pollard, 22 Wall., 341.
Kerwhacker *v.* C. C. & C. R. R. Co., 3 O. S., 172.
Railroad *v.* Munson, 30 O. S., 451.
15 Wall, 401.

IV.

Appellee is not chargeable with contributory negligence.

A clear preponderance of the testimony shows that appellee was resting his elbow on the base of the window or window-sill, not extending outside the car, with his head resting on his hand, and that his elbow was knocked off and outward by the shock of the collision. Witnesses upon this point, and who saw appellee's position just before the collision, are produced by appellee. Appellee himself (R. 32), A. C. Jennings (23), Julia Jennings (R. 24), Emily Henderson (R. 41); cross-examination, Q. 2, produced by appellant, Mrs. Kittie Allen, whose husband was at the time locomotive-engineer in the employ of appellant, and she travelling on the road on a free pass as often as she chose. Her testimony shows a strong desire to make out a case for appellant, and inconsistent in several particulars, which will appear upon examination. She says Kelly took his position when he got into the car at Springfield and did not move at all until the collision. Kelly says he occupied himself in examining his papers for some time after he took his seat. She says the car was full of passengers; the conductor and other witnesses say there were but few. She says the palace car was in the rear; whereas the car she and Kelly were in was the rear car of the train and

the palace car was in front of the smoking car. She says Kelly sat up straight, with his back against the seat, his shoulders right up against the edge of the window. "He was not leaning forward, but sat erect, leaning against the window; his back was against the seat in the corner."

In this position his elbow could not have extended outside of the window-sill, and if it did she could not have seen it from where she sat, as several witnesses have testified. The other witnesses all testify that his elbow was not outside of the car. Mrs. Henderson (R. 41) says she was standing not more than 20 or 30 feet from the train as it passed, and saw Kelly leaning on his arm. "His arm was not out of the car—just about on the middle of the window."

The position of appellee's arm was not negligence under the circumstances. Railroad companies are bound to keep all obstructions so far away as to prevent the possibility of collision with passenger trains. It is almost a universal habit for passengers to rest their arms on the window-sill when the windows are up in warm weather.

Curtis *v.* Central R. R., 6 McLean, 401.
Burton *v.* S. L. & C. R. R. Co., 52d Mo., 253.
Chicago B. & Q. R. R. *v.* Gregory, 58th Ill., 272.
51st Ill., 333; 39th Mo., 468; 58th Maine; 8th O. S., 581.
Wharton on Negligence, sec. 362.

Wharton says: "No doubt, in each of the cases where such contributory negligence has been held to prevent the passenger's recovery, the facts were such as to show that the passenger thrust out his arm to a distance which a railroad company, in pursuance of its duties as such, is not bound to keep clear."

V.

The carelessness of appellant by his agents was the proximate cause of the collision and injury to appellee, and the

negligence of the appellee, if any, was only the remote cause of the injury. Therefore, if there be negligence on the part of the appellee, yet if at the time when the injury was committed it might have been avoided by the appellant in the exercise of reasonable care and prudence, an action will lie for the injury. (Wharton on Negligence, secs. 301 to 341 and 362; 3 O. S., 172, 663, 105; 22d O. S., 26; 25 O. S., 631; 109 Mass., 288; 50 Mo., 461.)

"But it must be remembered that this doctrine of contributory negligence ceases when the person primarily inflicting the injury was either *in dolo* or guilty of *gross culpa*, which may be assimilated to *dolus*." Wharton, sec. 131.

"If the defendant is guilty of gross negligence, he cannot set up a trifling negligence or inadvertence of the plaintiff as a defence." Wharton, secs. 302, 362.

Respectfully submitted.

R. P. BUCKLAND,
Counsel for Appellee.